The Hertz Corporation *and* International Brotherhood of Teamsters, Local 390, AFL–CIO. Case 12–CA–19733

October 26, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On June 8, 1999, Administrative Law Judge William N. Cates issued the attached bench decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Shelley B. Plass, Esq., for the General Counsel.
Frank B. Shuster, Esq., for the Respondent.
Christine Catuccy, Esq., and *Libby Herrera-Navarrete, Esq.,* for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial in proceedings conducted in Miami, Florida, on May 13, 1999. At the conclusion of trial proceedings, and after hearing oral argument by counsel for the General Counsel (the General Counsel), counsel for the Hertz Corporation (the Company), and counsel for International Brotherhood of Teamsters, Local 390, AFL–CIO (the Union), I issued a bench decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (the Board) Rules and Regulations, setting forth findings of fact and conclusions of law, including my ultimate conclusion that the unfair labor practice complaint lacked merit and should be dismissed.

For the reasons stated by me on the record at the close of the trial, I found the Company did not, through its agent and supervisor, threaten employees with loss of retroactive pay if they chose to participate in a strike. The linchpin of the General Counsel's one allegation complaint pertained to a one-on-one conversation between an employee and a supervisor. The General Counsel did not call that employee to testify; nor, was any reason advanced for the failure to do so. The testimony of the supervisor, as credited, did not contain any unlawful threat. Accordingly, I dismissed the complaint in its entirety.

I certify the accuracy of the portion of the transcript, as corrected,[1] pages 165 to 175, containing my bench decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

Exceptions may be filed in accordance with Section 102.46 of the Board's Rules and Regulations, but if they are not timely or properly filed, Section 102.48 provides that my bench decision shall automatically become the Board's decision and order.

CONCLUSIONS OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act), and has not violated the Act in any manner alleged in the complaint.

ORDER[2]

The unfair labor practice complaint is dismissed.

APPENDIX A

BENCH DECISION

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JUDGE CATES: On the record.

This is my decision in the matter of The Hertz Corporation and International Brotherhood of Teamsters, Local 390, AFL–CIO, Case 12–CA–19733.

The charge in this case was filed by the International Brotherhood of Teamsters, Local 390, AFL–CIO on October 27, 1998, thereafter amended on February 12, 1999, both the original charge and the amendment were properly and timely served on The Hertz Corporation.

I shall hereinafter refer to The Hertz Corporation as the Company, and the International Brotherhood of Teamsters, Local 390, AFL–CIO as the Union.

The Company, in this case, a Delaware corporation, has offices and a place of business located in West Palm Beach, Florida. The Company is engaged in the business of renting vehicles in various locations throughout the United States.

During the calendar year preceding the issuance of the Complaint herein, the Company purchased and received at its West Palm Beach, Florida, local market facility, products, goods and services valued in excess of $50,000 directly from points outside the State of Florida.

The evidence establishes the parties admit, and I find the Company is an Employer engaged in commerce within the

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meaning of Section 2(2)(6) and (7) of the Act.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[1] I have corrected the pages of the transcript containing my bench decision in the following manner: P. 165, L. 1 inserted my before the word decision; L. 9 deleted any; L. 17 placed a period after Florida, deleted where and commenced new sentence with the; L. 25 deleted that. P. 166, L. 6 deleted that, L. 23 deleted herein. P. 171, L. 21 deleted locations and from. P. 172, L. 1 added pay before the word retroactive, L. 21 quotation marks after the word Employer, L. 23 inserted or after the word coerce. P. 173, L. 17 deleted when.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

The Union has negotiated numerous collective bargaining agreements for the employees at issue herein. It has represented them by filing charges and other matters.

The evidence establishes the parties admit, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

The evidence establishes, the parties admit, and I find that Evan Hoffmann, currently serving as the station manager of operations and formerly the revenue manager for the Company, at the location involved herein, is a supervisor and agent of the Company within the meaning of Section 2(11) and 2(13) of the Act.

The case herein primarily involves the customer sales representatives or the customer service representatives, which have been used interchangeably herein, at the West Palm Beach, Florida location of the Company.

Perhaps inextricably intertwined is the negotiating history of the Union and the Company regarding the customer sales representatives.

There are approximately thirty customer service or customer sales representatives at the West Palm Beach, Florida location of the Company.

Perhaps there are as many as twenty-eight of them at the West Palm Beach Airport itself, with the other two being down at

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the Company's facility on Belvedere Road, I believe it was.
That there has been a long bargaining history between the parties is certainly not disputed. In fact, customer service or customer sales representative Ratz testified she had either been a steward, an alternate steward, a business agent, or had been involved with the Union, vis-a-vis negotiations and administration of contracts, for perhaps the last twenty-five
years.

So it's clear that there is a long-standing bargaining relationship between the parties herein.

The same Local Union negotiates agreements for other Hertz employees at the locations I have mentioned, but at the request of the General Counsel at the beginning of the trial, and based on the Complaint allegations herein, I have specifically limited the presentation of evidence in this case to the one unit of employees that are involved in this dispute.

The most recent collective bargaining agreement between the parties applicable herein, expired, I believe, in January of 1998. Negotiations began for a new collective bargaining agreement between the parties.

However, those negotiations did not begin immediately upon the expiration of the previous contract. The witnesses testified that the relationship between the Company and the Union and, specifically, the Union as it involves the customer sales representatives, would wait sometimes perhaps weeks or

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months before they actually started negotiating toward a new collective bargaining agreement.

In this particular case, the contract expired in January of 1998 and the evidence indicates that negotiations toward a new collective bargaining agreement did not begin until June 17, 1998, and perhaps there were a couple of negotiating sessions in June, June 17 and June 18, 1998. No contract was arrived at during those two negotiating sessions.

Another bargaining session was held on or about September 2, 1998 and, again, no collective bargaining agreement was arrived at. And then, down in the middle of December 1998, a collective bargaining agreement was arrived at.

The particular facts and the issues and the allegations in this particular Complaint of the Government, involves the time during which negotiations were taking place toward the contract that it appears was arrived at in late December 1998.

The allegation of the Complaint, and there is only one, is set forth in the Complaint at Paragraph 5 thereof. And in its amended state, reads as follows:

"In or about early October 1998, a more precise date being unknown to the undersigned, the Company, by its supervisor Hoffmann, at Respondent's Belvedere Road facility, threatened its employees with a loss of retroactive pay if they chose to participate in a strike."

The Government stated that the evidence in support of that

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particular allegation of the Complaint was limited to a conversation that took place between Supervisor Hoffmann and Employee McClintock.

Before I get to the content of that conversation, retroactive pay, as utilized and defined for this particular case, is that having been the policy of the Company and Union not to commence negotiations at a time before the contract expired, or as the contract expired, but rather negotiations historically had started at some later point, it had been the practice to have the employees, if all conditions were met, be paid for the newly negotiated wage rate from the date of the expiration of the previous contract.

And, in fact, one of the witnesses who testified equated it to a bonus, that the employees always looked forward to the amount of money they would receive that would constitute their retroactive pay, and it was sort of a bonus to them.

They had been working for a previous pay schedule and all of a sudden, they're going to be paid more, and they're going to be paid more in a retroactive manner, to bring them within the framework of the newly negotiated contract.

As I have indicated, it is in this posture that the unfair labor practice allegation of the Complaint has its roots.

The case herein is specifically limited to one exchange between Employee McClintock and Supervisor Hoffmann. This record only provides Supervisor Hoffmann's account of that

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conversation.

No party elected to call Employee McClintock, nor was any explanation offered by any party as to why he was not called as a witness. Therefore, Supervisor Hoffmann's account of the conversation is undisputed.

After having carefully observed Supervisor Hoffmann testify, I know of no reason to reject his testimony.

Supervisor Hoffmann testified that the conversation came about in the following manner.

That he went to the Boca Raton, Florida, location where Mr. McClintock worked and he was there for the purpose of observing, assisting, training, and helping Employee McClintock improve his revenues.

Supervisor Hoffmann explained what he meant by that, that he observed the individuals, and in this case Mr. McClintock, as to how they could interact with the customers, the customers

being those wishing to rent automobiles, in order to enhance their revenues.

Supervisor Hoffmann testified he was in good standing and had a good relationship with all of the customer sales representatives, because of the nature of his job. It was his job to help the customer sales representatives improve their revenues.

And he was visiting with Employee McClintock on the day in question, which I believe he placed in October. If that is not

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the exact date, for the purposes of this case, I find that it makes no impact.

That he had observed Mr. McClintock perform his job for a period of time and that after Mr. McClintock had no customers with him, he and Mr. McClintock stepped into a room, apparently behind the customer sales counter, and he explained to Mr. McClintock how he could improve his performance.

And in the exchange, Mr. McClintock indicated that he had been hearing a number of things from individuals regarding retroactive pay, and he wanted to know if they would get it or not.

And Supervisor Hoffmann testified he told Employee McClintock, I don't have a crystal ball, I can't tell you what's going to happen. It is my understanding Hertz generally does not pay retro pay to those who go on strike.

That is the conversation that counsel for the General Counsel contends violated the Act.

Supervisor Hoffmann testified that he based the comments that he made to Employee McClintock on his understanding of the Company's policies and practices and the feedback that he had had from Company managers in the areas of Boston, Philadelphia and Detroit.

Did the Company have any policy or practice with respect to retroactive pay?

The Government contends that its practice was to always

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Pay retroactive pay and that consistently it had done so. I think all of the witnesses who testified, who had an opportunity to testify on that particular point, indicated that retroactive pay had, in fact, always been paid to the customer sales representatives in prior negotiations.

However, each of the witnesses who had an opportunity to speak to the point, indicated there had never been a strike at the West Palm Beach facility that involved the customer sales representatives.

Likewise, the Company produced a letter that was sent to the Union dated March 7, 1995, from the manager of labor relations for the Company, in which it was specifically speaking to the counter sales representatives employed in the West Palm Beach, Florida location.

And in that letter, the Company indicated to the Union, among other items, "As I indicated to you, the Company agrees that any wage increase finally negotiated will be retroactive to January 31, 1995, provided that both parties continue to bargain in good faith and further provided that there is no work stoppage, slow down or other economic actions against this Employer."

Was the comment that Supervisor Hoffmann made in October of 1998 of such that it would tend to coerce or threaten employees and interfere with their rights?

The Government contends the comment, on its face, would do

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so and particularly when viewed in light of the fact that the comment arose during the time of negotiations.

The Company contends that it would not violate the Act, that nothing on its face in the comment would be coercive or threatening and, specifically further, when viewed in light of the Company's policies and practices, that Supervisor Hoffmann was simply stating the Company's policy as expressed in correspondence to the Union, and as perhaps engaged in at other locations.

In the circumstances of this case, does Supervisor Hoffmann's comments, his undisputed comments, reasonably have a tendency to coerce and intimidate employees and violate the Act?

I find that his comments would not. There was not a threat herein to a pre-existing benefit. The Company had not raised with the Union, nor the Union with the Company, the matter of retroactive pay in the most recent contract negotiations at the time the comment was made from Supervisor Hoffmann to Employee McClintock.

Supervisor Hoffmann did not seek Employee McClintock out to express some comments about retroactive pay, but rather Employee McClintock came to supervisor Hoffmann and sought the information involved.

Supervisor Hoffmann did not make an express statement that certain things would happen. He simply stated that he had no crystal ball, that he didn't know what might happen, that it was

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his understanding, and I'm persuaded one that could be reasonably based upon the correspondence that had communicated between the Company and the Union, as well as his uncontradicted testimony about the policies that he had understood and heard from others, that he was, in fact, expressing the policy of the Company at the behest and request of the employee.

The subject matter had not been raised in negotiations. So I shall dismiss the Complaint with respect to the threat as alleged in Paragraph 5 of the Complaint.

And by the way, Paragraph 5 of the Complaint is limited, specifically, by the General Counsel, to the exchange between Hoffmann and McClintock.

In dismissing the Complaint, I reject the General Counsel's contention the past practice had always been to pay retro pay. That is true in this particular case, but only because the customer sales representatives had never engaged in a strike at this facility that would have caused or possibly caused the Company to reject retroactive pay.

The customer sales representatives bargaining representative had been placed on notice in prior contract negotiations, that retroactive pay was subject to the employees not striking or engaging in a slow down or work related stoppages. There was that advisement clearly made to the Union in prior negotiations.

I likewise reject the General Counsel's contention that

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the prior negotiations cannot be considered, as to whether the Company had a policy or not, as being contrary to the facts.

And further, I reject the General Counsel's contention that perhaps the personalities had changed and somehow a change in personalities would change policy or change the parties' understanding of the policy, when the matter was never discussed. I find that unpersuasive.

I shall, upon receipt of the transcript, certify my decision in this matter, which is to dismiss the Complaint, and it is my understanding that when I have so certified the pages of the transcript that constitute my decision to the Board, that the appeals period for taking exceptions to my decision, runs from that time.

I advise you, however, to follow the Board's rules and regulations rather than my understanding of them, because I believe you'll be in much better stead if you do.

It has been a pleasure to be in Miami, Florida, and I have enjoyed hearing this case. Counsel for all sides have done a remarkably good job in presenting the evidence, and perhaps fortunate to some, and unfortunate to others, there are winners and losers, and that's the nature of the business.

I thank you for your attention, and this trial is closed.

(Whereupon, at 4:20 p.m., the hearing in the above-entitled matter was closed.)